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TESTIMONY OF THE CENTER FOR CHILDREN'S ADVOCACY IN OPPOSITION TO SECTION 3 OF RAISED BILL NO. 5425, AN ACT CONCERNING SPECIAL EDUCATION

March 8, 2010

This testimony is submitted on behalf of the Center for Children's Advocacy, a non-profit organization based at the University of Connecticut School of Law. The Center provides holistic legal services for poor children in Connecticut's communities through individual representation and systemic advocacy. Through our Truancy Court Prevention Project and TeamChild Juvenile Justice Project, the Center represents children in securing appropriate educational programming and improving academic outcomes by reducing high suspension, expulsion, and dropout rates.

We strongly oppose section 3 of Raised Bill No. 5425, An Act Concerning Special Education, which places the burden of proof in special education due process hearings on the party seeking the hearing, most often parents who allege that the school has failed to meet their child's unique educational needs.

Under Connecticut's existing special education regulations, if the parent or guardian of a child eligible for special education services requests a due process hearing to challenge the effectiveness of her child's IEP, the local educational agency bears the burden of proving that the academic program affords the child a free appropriate public education (FAPE).[1] This approach is consistent with the laws of other jurisdictions,[2] and has been supported by Attorney General Richard Blumenthal,[3] the former Commissioner of the Department of Education,[4] and numerous special education advocates.[5] Requiring the district to demonstrate that its plan is reasonably tailored to meet the child's individual needs may actually help avoid the administrative and litigation costs of challenges to inadequate educational programming by strengthening the school's resolve to carefully develop an appropriate IEP.[6]

a. Shifting the Burden of Proof to Parents is Inconsistent with the Goals of State and Federal IDEA Regulations

[1] CONN. AGENCY REGS. § 10-76h-14 provides that in special education due process hearings, "*the public agency* has the burden of proving the appropriateness of the child's program or placement, or of the program or placement proposed by the public agency" (emphasis added).

[2] *See, e.g.*, DEL. CODE. ANN. tit. 14, § 3140 (West 2009); D.C. MUN. REGS. tit. 5, § 3030.3 (West 2009); N.J. STAT. ANN. § 18A:46-1.1 (West 2009).

[3] Elissa Gootman, *Special Education Ruling's Effects Unclear*, N.Y. TIMES, Nov. 17, 2005, at A28.

[4] Circular Letter, Series 2005-06, C-9 (Feb. 22, 2006) (noting that Connecticut's burden of proof regulation represents "a valid state policy that school districts are in a better position to defend the appropriateness of an IEP").

[5] *Joint Committee on Education Public Hearing* (March 23, 2009) (statement of Catherine Holahan, Attorney); *Joint Committee on Education Public Hearing* (March 23, 2009) (statement of Maria Morelli-Wolfe & Lynn Cochrane, Attorneys); *Joint Committee on Education Public Hearing* (March 23, 2009) (statement of James D. McGaughey, Executive Director, Office of Protection and Advocacy for Persons with Disabilities).

[6] Schaffer v. Weast, 546 U.S. 49, 65 (2005) (Ginsburg, J., dissenting).

The Individuals with Disabilities Education Act (IDEA) was implemented to remedy the absence of appropriate educational programming and the lack of adequate school-based resources for millions of children with disabilities.[7] Consequently, IDEA and Connecticut regulations impose an affirmative duty on school districts to protect and promote the educational welfare of disabled children by identifying students in need of interventions and formulating their IEPs.[8] The decision to impose on the district an obligation to find and program for students eligible for special education services, and to afford these students and their parents extensive procedural safeguards, reflects a clear commitment to protecting the educational rights of children with disabilities. Shifting the burden of proof to parents who challenge the adequacy of their child's educational program unfairly forces them to assume the role of IDEA-enforcer; a role that is contrary to IDEA's strong policy statement in favor of holding districts legally responsible for implementing and monitoring the provision of special education services to all eligible students, and one that parents are ill-equipped to handle. The U.S. Supreme Court's decision regarding burden of proof in special education due process hearings, *Schaffer v. Weast*, does not apply to Connecticut.[9] In *Schaffer*, the Court only addressed the issue of where to locate the burden of proof when state law was silent on the issue.[10] Since Connecticut state law allocates the burden of proof to the public agency, *Schaffer* does not impact Connecticut.

b. **Allocating the Burden of Proof to School Districts Holds them Accountable for Complying with IDEA**

When a dispute arises regarding the adequacy of the child's IEP, the school district is in the best position to demonstrate that it has complied with federal law. An overwhelming majority of parents whose children are eligible for special education services lack the sophistication and specialized training necessary to challenge the design and implementation of their child's IEP and very few can afford legal representation to guide them through such a challenge.[11] Given the complex nature of special education law, and the availability of numerous interventions and alternative programs for children struggling to access the curriculum, parents face significant barriers to proving that the district has denied their child a free, appropriate education. By contrast, local school districts can draw on a wealth of expertise and training, as well as their experiences with other disabled children, to demonstrate the appropriateness of a child's academic plan and their compliance with IDEA.[12] Maintaining the burden of proof on the school districts ensures an important dimension of accountability and serves as an additional guarantee that all students, regardless of their cognitive or behavioral deficits, have an equal chance at academic success. We urge you to protect the rights of special education students by opposing this section of the bill.

Thank you for your time and consideration.

Respectfully submitted,

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[7] 20 U.S.C. § 1400(c)(2).
[8] 34 C.F.R. § 300.11; CONN. AGENCY REGS. § 10-76d-6.
[9] *Schaffer*, *supra* note 6.
[10] *Id.* at 62.
[11] David M. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166, 187–94 (1991).
[12] Oberti v. Bd. of Educ. of Borough of Celmenton Sch. Dist., 995 F.2d 1204, 1219 (3d Cir. 1993).